



19 October 2011

CONSULTATION ON A DRAFT NATIONAL POLICY STATEMENT FOR HAZARDOUS WASTE

INTRODUCTION

1. The UK Environmental Law Association (**UKELA**) aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study and formulation of environmental law in the UK and the European Union. UKELA attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.
2. UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the Waste Working Party and the Planning & Sustainable Development Working Party.
3. UKELA makes the following comments on the Consultation on a Draft National Policy Statement for Hazardous Waste.

GENERAL COMMENTS

4. UKELA notes that the draft Hazardous Waste NPS exists to guide, on a statutory basis, the IPC and/or Secretary of State when considering applications to develop Nationally Significant Infrastructure Projects. It is therefore essentially a spatial planning document which should seek to provide objective tests that can be applied to determine whether the proposed development is appropriate in land-use planning terms. In view of this, UKELA is disappointed to note that the document is essentially devoid of spatial planning guidance.
5. UKELA recognises that it is Defra's view that the preferred locations and number of facilities are matters for the market and not for Government. Therefore Defra does not intend to provide "allocations" for particular facilities in the way that Local Plans allocate sites for development. However, it would still be perfectly possible to provide guidelines to be applied to applications to indicate to the IPC/Planning Inspectorate what characteristics a suitable site should have. This clarity in terms of policy would be advantageous to potential developers as well as to Local Authorities drafting their Local Plans. It is also likely to reduce the room for challenge to decisions by presenting a clearer policy framework for the IPC's (or Planning Inspectorate's) work.
6. UKELA notes that the draft Hazardous Waste NPS does not include technical detail with regard to many areas, but instead refers to soon-to-be-abolished Planning Policy Statements and Planning Policy Guidance notes. UKELA also notes that the National Planning Policy Framework does not include significant technical detail. UKELA is concerned that the absence of technical guidance will again make the system more liable to

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challenge on “reasonableness” grounds, which would increase costs and delay the development of infrastructure that Defra has decided is of national importance.

QUESTION 1. DO YOU THINK THIS DRAFT HAZARDOUS WASTE NPS CLEARLY ESTABLISHES THE NEED FOR SUCH INFRASTRUCTURE FOR THOSE CONSIDERING DEVELOPING PROPOSALS FOR NATIONALLY SIGNIFICANT INFRASTRUCTURE PROJECTS FOR HAZARDOUS WASTE?

7. UKELA notes the statement on page 12 of the draft Hazardous Waste NPS (Section 3.1) that “*the IPC should start its assessment of applications for infrastructure covered by this NPS on the basis that need has been demonstrated*”. However, it is not clear to UKELA from the contents of Part 3 of the draft NPS what the Government considers to be the need for new hazardous waste infrastructure, particularly in the light of the assessment of facility needs for hazardous waste management in England contained in Annex 2 of the Strategy for Hazardous Waste Management in England issued in March 2010 (**Hazardous Waste Strategy**). While the Hazardous Waste Strategy would also be a material consideration which the IPC would need to take into account in its decision-making process, the relationship between the Hazardous Waste Strategy and the draft Hazardous Waste NPS is not clear. UKELA suggests that this be clarified in the draft Hazardous Waste NPS.
8. UKELA is concerned that Part 3 of the draft Hazardous Waste NPS makes no credible attempt to forecast likely hazardous waste arisings other than in very general terms such as “*future increases are expected*” (paragraph 3.2.2, page 13) and “*This trend is expected to continue*” (paragraph 3.2.5, page 13). Where figures are given, they are misleading – for example, paragraph 3.2.5 on page 14 refers to figures indicating that arisings of waste desktop monitors, laptops and LCD TVs are expected to increase from 40,000 tonnes in 2011 to around 120,000 tonnes by 2016. What the draft Hazardous Waste NPS has missed is that much of this tonnage is not actually hazardous waste – for instance, a plastic casing removed from a monitor is non-hazardous waste.
9. UKELA also notes that the list of waste streams in Annex 2 of the Hazardous Waste Strategy is more comprehensive than that contained in Section 3.4 of the draft Hazardous Waste NPS. For example, Annex 2 of the Hazardous Waste Strategy also lists a number of types of facility for which the additional need is not clear cut, such as high temperature incinerators and municipal waste incinerators authorised to take hazardous waste.

QUESTION 2. DO YOU THINK THAT THE TYPES OF INFRASTRUCTURE OUTLINED BY THE DRAFT HAZARDOUS WASTE NPS CAPTURE THE NEED FOR NATIONALLY SIGNIFICANT INFRASTRUCTURE TO HELP IMPLEMENT THE STRATEGY FOR HAZARDOUS WASTE MANAGEMENT AND DRIVE THE MANAGEMENT OF HAZARDOUS WASTE UP THE WASTE HIERARCHY? IF NOT, WHAT ELSE SHOULD BE INCLUDED?

10. Please see the comments above in the response to Question 1 in relation to the lack of any consideration in the draft Hazardous Waste NPS of the infrastructure outlined in Annex 2 of the Hazardous Waste Strategy for which the additional need is not clear cut.

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QUESTION 3. DO YOU THINK THE DRAFT HAZARDOUS WASTE NPS ADEQUATELY SETS OUT FOR THE INFRASTRUCTURE PLANNING COMMISSION THE KEY ASSESSMENT PRINCIPLES TO INFORM THE ASSESSMENT OF FUTURE HAZARDOUS WASTE INFRASTRUCTURE DEVELOPMENT APPLICATIONS?

11. UKELA notes the comment on page 19 of the draft Hazardous Waste NPS (Section 4.1.1) that “*there should be a presumption in favour of granting consent to applications for hazardous waste NSIPs which clearly meet the need for such infrastructure established in this NPS*”. Defra will be aware of the emerging National Planning Policy Framework and the presumption in favour of sustainable development which it contains. UKELA suggests that this paragraph be modified to reflect this principle.
12. UKELA also notes that Section 4.1.5 of the draft Hazardous Waste NPS (page 19) refers back to Planning Policy Statements and Planning Policy Guidance notes, most of which will be revoked when the National Planning Policy Framework takes effect. UKELA suggests that Defra should therefore consider whether it is still appropriate for the draft Hazardous Waste NPS to take account of these documents and to consider the relationship between the draft Hazardous Waste NPS and the National Planning Policy Framework.

QUESTION 4. DO YOU THINK THE DRAFT HAZARDOUS WASTE NPS ADEQUATELY SETS OUT FOR THE INFRASTRUCTURE PLANNING COMMISSION HOW IT SHOULD CONSIDER ALTERNATIVES WHEN IT COMES TO PARTICULAR PROJECTS?

13. Given that by definition these developments are large scale projects which are likely to have large catchments, the guidance on alternatives is very limited. It would be helpful to provide some guidance on how the search for alternatives should be carried out and presented. In the absence of any such guidance there is potential for significant debate and argument over alternatives for every proposal.

QUESTION 5. DO YOU THINK THE DRAFT HAZARDOUS WASTE NPS GIVES APPROPRIATE GUIDANCE TO DECISION MAKERS ON HOW THEY SHOULD ASSESS THE NEED TO CONSIDER “GOOD DESIGN” FOR HAZARDOUS WASTE INFRASTRUCTURE?

14. UKELA has no comments on this question.

QUESTION 6. IT IS A REQUIREMENT OF THE PLANNING ACT 2008 THAT A NPS MUST INCLUDE AN EXPLANATION OF HOW THE POLICY SET OUT IN THE STATEMENT TAKES ACCOUNT OF GOVERNMENT POLICY RELATING TO THE MITIGATION OF, AND ADAPTATION TO, CLIMATE CHANGE. DO YOU THINK THE DRAFT HAZARDOUS WASTE NPS ADEQUATELY FULFILS THIS REQUIREMENT?

15. UKELA has no comments on the way in which the draft Hazardous Waste NPS addresses adaptation to climate change, but believes that it is deficient in its treatment of climate change mitigation. Paragraph 4.6.1 correctly identifies the duty imposed on the Secretary of State by Section 10(3)(a) of the Planning Act 2008 to have regard to the desirability of mitigating and adapting to climate change in designating a NPS. However, the rest of Section 4.6 is dedicated exclusively to adaptation, except for one further mention of

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mitigation in the last line on page 23 (which should, in any event, be a reference to "mitigation and/or adaptation", rather than "mitigation or adaptation"). UKELA also notes that there is no mention of greenhouse gas emissions in Section 5.2 of the draft Hazardous Waste NPS. Given the global warming potential of methane compared with carbon dioxide and the energy-intensive nature of many hazardous waste management options (for example, the stabilisation of hazardous waste to enable it to be landfilled), UKELA suggests that Section 4.6 of the draft Hazardous Waste NPS should be modified to also cover climate change mitigation as a priority.

QUESTION 7. HAVE ALL THE POTENTIAL ENVIRONMENTAL IMPACTS OF HAZARDOUS WASTE DEVELOPMENT AND OPTIONS FOR THEIR MITIGATION BEEN IDENTIFIED IN THE ASSESSMENT PRINCIPLES AND GENERIC IMPACTS PART OF THE HAZARDOUS WASTE NPS (THIS IS PART 4 AND PART 5)?

16. Please see the comments in response to Question 6 above in relation to the potential climate change impacts of hazardous waste impact and mitigation options.
17. UKELA also has some specific comments on Sections 4 and 5 of the draft Hazardous Waste NPS:
 - (a) Paragraph 4.2.5 of the draft Hazardous Waste NPS refers to "*cases where the EIA Directive does not apply to a project, and an ES is not therefore required*". Such a scenario is unconceivable, as EIA would inevitably be required for a hazardous waste NSIP.
 - (b) Paragraph 4.7.3 of the draft Hazardous Waste NPS reflects the content of paragraph 10 of Planning Policy Statement 23: Planning and Pollution Control, which UKELA notes will be revoked following the adoption of the National Planning Policy Framework. The Courts have provided further guidance on the relationship between the planning and pollution control regimes in the case of *Harrison v Secretary of State for Communities and Local Government, Cheshire West and Chester Council* [2009] EWHC 3382 (Admin) and UKELA suggests that some of the principles from this case should be included in the draft Hazardous Waste NPS to provide further guidance to the IPC. In particular, if the IPC considers that there might be adverse consequences because of the effects of a proposed hazardous waste NSIP on amenity and/or issues as to the appropriateness of locating the development on the site in question, the IPC is entitled to have regard to such matters as material considerations in making its decision on the planning merits of the proposed development.
 - (c) UKELA notes that paragraph 4.7.7 of the draft Hazardous Waste NPS encourages applicants, wherever possible, to submit applications for Environmental Permits and other necessary consents at the same time as applying to the IPC for development consent. UKELA does not believe that this reflects reality – Defra will be aware that an Environmental Permit cannot be granted for a waste operation unless a planning

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permission authorising the development is already in place. In practice, therefore, most (if not all) developers will wait until they have obtained development consent before submitting an application for an Environmental Permit, in order to reduce risk and minimise costs.

- (d) UKELA has concerns over the use of Section 158 of the Planning Act 2008 as outlined in paragraph 4.11 of the draft Hazardous Waste NPS. UKELA believes that the draft Hazardous Waste NPS does not provide sufficient justification for the use of Section 158 in respect of hazardous waste facilities that are NSIPs, compared with non-NSIPs. This provides a competitive advantage to NSIPs. UKELA would draw to Defra's attention the Technology and Construction Court's judgment in *Barr v Biffa Waste Services Limited* [2011] EWHC 1003 (TCC), in which the Court ruled that a statutory authority defence was not appropriate for waste facilities. However, the use of a facility in accordance with the conditions of an Environmental Permit is a reasonable user and should not attract liability if the operator is not negligent. It cannot be right that the operator of a NSIP hazardous waste facility which breaches its permits should be immune from a nuisance action whereas the operator of a non-NSIP facility in the same position would be liable.
- (e) Section 5.3.5 of the draft Hazardous Waste NPS (page 33) refers to the Government's 2002 Biodiversity Strategy "*Working with the grain of nature*". This reference should be replaced with a reference to "*Biodiversity 2020: A Strategy for England's Wildlife and Ecosystem Services*".
- (f) UKELA supports the proposed treatment of pSPA and listed Ramsar sites, which it notes reflects the treatment set out by the Administrative Court in *Humber Sea Terminal Limited v Secretary of State for Transport* [2005] EWHC 1289 (Admin).
- (g) UKELA suggests that Section 5.3 of the draft Hazardous Waste NPS should also include references to proposed new nature conservation designations such as Ecological Restoration Zones and Nature Improvement Areas.
- (h) UKELA believes that paragraph 5.3.20 of the draft Hazardous Waste NPS (page 36) does not properly reflect the judgment of the Supreme Court in *Morge v Hampshire County Council* [2011] UKSC 2. Although the Court of Appeal in this case found that planning authorities must consider whether any relevant species mitigation licence is likely to be granted or refused, the Supreme Court ruled that the planning authority's only obligation is "to *have regard to the requirements of the Habitats Directive so far as [those requirements] may be affected by*" their decision whether or not to grant a planning permission" (see paragraph 29 of the judgment). Paragraph 5.3.20 should therefore be amended to reflect the Supreme Court's ruling on this point.

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QUESTION 8. DO YOU THINK THE DRAFT HAZARDOUS WASTE NPS CONSIDERS ALL THE SIGNIFICANT IMPACTS OF HAZARDOUS WASTE DEVELOPMENT? IF NOT, WHAT DO YOU THINK IS MISSING AND WHY?

18. Please the comments above in relation to Part 5 of the draft Hazardous Waste NPS.

QUESTION 9. DO YOU THINK THAT THE GOVERNMENT SHOULD FORMALLY APPROVE (“DESIGNATE”) THE DRAFT HAZARDOUS WASTE NPS?

19. Provided the points set out in this response are considered and taken into account in a new draft Hazardous Waste NPS, yes.

QUESTION 10. DO YOU BELIEVE THAT THE APPRAISAL IDENTIFIES THE LIKELY SIGNIFICANT SUSTAINABILITY EFFECTS ASSOCIATED WITH THE DRAFT HAZARDOUS WASTE NPS? IF NOT, WHAT EFFECTS DO YOU FEEL ARE NOT CORRECTLY IDENTIFIED AND WHY?

20. UKELA has no comments on this question.

QUESTION 11. DO YOU BELIEVE THAT THE APPRAISAL IDENTIFIES THE REASONABLE ALTERNATIVES TO THE POLICY CONTAINED WITHIN THE DRAFT HAZARDOUS WASTE NPS? IF NOT, WHAT OTHERS SHOULD HAVE BEEN CONSIDERED AND WHY?

21. UKELA has no comments on this question.

QUESTION 12. DO YOU BELIEVE THAT ANY FURTHER MEASURES ARE NECESSARY TO PREVENT, REDUCE OR OFFSET LIKELY SIGNIFICANT EFFECTS OF THE DRAFT HAZARDOUS WASTE NPS? IF SO, WHAT FURTHER MITIGATION DO YOU THINK SHOULD HAVE BEEN COVERED IN THE AoS?

22. UKELA has no comments on this question.

QUESTION 13. DO YOU BELIEVE THAT THE AoS CORRECTLY DESCRIBES THE CUMULATIVE IMPACTS THAT MAY OCCUR? IF NOT, WHAT IS MISSING?

23. UKELA has no comments on this question.

QUESTION 14. DO YOU CONSIDER THE MONITORING PROPOSALS SET OUT IN SECTION 9 OF THE AoS TO BE APPROPRIATE AND SUFFICIENT TO MONITOR THE SIGNIFICANT EFFECTS OF THE IMPLEMENTING THE DRAFT HAZARDOUS WASTE NPS? IF THEY ARE NOT SUFFICIENT, WHAT MEASURES DO YOU THINK SHOULD BE ADOPTED?

24. UKELA has no comments on this question.

QUESTION 15. DO YOU AGREE WITH THE CONCLUSIONS AND RECOMMENDATIONS OF THE REPORT OF THE APPRAISAL OF SUSTAINABILITY OF THE DRAFT HAZARDOUS WASTE NPS?

25. UKELA has no comments on this question.

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QUESTION 16. DO YOU HAVE ANY FURTHER COMMENTS ON THE AOS REPORT OR THE APPRAISAL DESCRIBED THEREIN?

26. No.

QUESTION 17. DO YOU AGREE WITH THE PREFERRED OPTION, WHICH IS TO PRODUCE A HAZARDOUS WASTE NPS THAT ALLOWS FOR MARKET LED INFRASTRUCTURE DEVELOPMENT WITH NO SPECIFICATION OF LOCATION OR SUITABLE TECHNOLOGIES? IF NOT, PLEASE PROVIDE INFORMATION AS TO WHY?

27. UKELA generally agrees with this approach, but notes that markets do not operate perfectly and therefore regulatory intervention may be required in certain circumstances. Please also see the comments in paragraph 5 above in relation to the provision of guidelines on the characteristics of suitable sites.

QUESTION 18. DO YOU CONSIDER THAT COSTS AND BENEFITS STATED IN THE IMPACT ASSESSMENT ARE VALID FOR YOUR BUSINESS? IF NOT, PLEASE PROVIDE WHATEVER EVIDENCE YOU CAN TO ENABLE A MORE ACCURATE ASSESSMENT TO BE MADE. ANY INFORMATION YOU PROVIDE WILL BE USED IN THE IMPACT ASSESSMENT THAT WILL BE PRODUCED FOLLOWING CONSULTATION.

28. UKELA has no comments on this question.

QUESTION 19. DO YOU CONSIDER THAT THE SPLIT OF APPLICATIONS AGAINST THE TYPE OF PANEL COMMISSIONED TO DEAL WITH IT IS LIKELY TO ACCURATELY REFLECT THE NATURE OF APPLICATIONS COMING FROM THE HAZARDOUS WASTE SECTOR? IF NOT, PLEASE PROVIDE INFORMATION AS TO WHY.

29. UKELA has no comments on this question.

QUESTION 20. DO YOU AGREE WITH THE ASSUMPTION IN THE IA THAT THERE ARE NO TRANSITIONAL COSTS THAT WOULD FALL ON BUSINESS FROM THIS PROPOSAL? IF NOT, PLEASE PROVIDE INFORMATION AS TO WHY.

30. UKELA has no comments on this question.

QUESTION 21. DO YOU HAVE ANY COMMENTS ON THE FEE ESTIMATES IN THE IMPACT ASSESSMENT?

31. No.

QUESTION 22. DO YOU HAVE ANY COMMENTS ON THE ASSESSMENT OF THE IMPACT ON SMALL AND MEDIUM ENTERPRISES?

32. No.

QUESTION 23. DO YOU HAVE ANY DATA ON COSTS FOR SHIP RECYCLING FACILITIES?

33. No.

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QUESTION 24. ARE YOU ABLE TO PROVIDE ANY INFORMATION ON THE NUMBER OF APPLICATIONS THAT YOU EXPECT TO SUBMIT FOR CONSENT APPROVAL OVER THE NEXT FIVE YEARS?

34. This question is not relevant to UKELA.

QUESTION 25. DO YOU HAVE ANY COMMENTS ON THE HABITATS REGULATIONS ASSESSMENT REPORT ON THE DRAFT HAZARDOUS WASTE NPS?

35. No.

QUESTION 26. DO YOU HAVE ANY COMMENTS ON THE EQUALITIES IMPACT ASSESSMENT REPORT FOR THE DRAFT HAZARDOUS WASTE NPS?

36. No.

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